Bekalan Sains P&C Sdn Bhd v Bank Bumiputra Malaysia Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMMERCIAL TRIAL NO D1–22–2531 OF 1999
HAMID SULTAN J
16 OCTOBER 2009

Banking — Banks and banking business — Restructuring of banking facilities — Unilateral variation of contract by bank imposing additional conditions in respect of unutilised portion of facility — Whether bank in breach of restructured facility agreement — Whether bank liable in damages to borrower for not extending agreed facilities

Contract — Breach — Damages — Loss speculative — Whether steps taken to mitigate loss — Whether losses too remote — Whether claim for damages allowed — Contracts Act 1950 s 74

Contract — Construction of terms of contract — Document termed as restructured agreement — Document actually continuing facility with some amendments to terms — Whether duty of court to assess true meaning and effect of transactions contemplated by parties

The defendant had granted banking facilities to the plaintiff. The plaintiff defaulted on several occasions and after much negotiation to assist the plaintiff to meet with their obligations the facility was by a letter of offer dated 26 February 2006 restructured subject to terms and conditions. The plaintiff claimed that when the restructured facility was negotiated and agreed upon, it was clearly understood that the unused portion of the facility was still available to the plaintiff. According to the plaintiff subsequently the bank had changed its mind and this change was communicated to the plaintiff vide a letter dated 26 April 1996 setting out new terms and conditions. The plaintiff did not accept this unilateral variation of contract and asserted that a binding and concluded agreement had been reached vide the letter dated 26 February 1996. The plaintiff contended that the subsequent letter dated 26 April 1996 which imposed a condition of deposit of 1:1 basis in respect of the unutilised portion was a breach of the restructured facility agreement. The plaintiff claimed loss and damages following from the defendant's breach of contract. The defendant argued that the restructured facility was subject to

terms and conditions and was done to rehabilitate the non performance of the loan by the plaintiff and that the plaintiff failed to comply with the terms and conditions. In respect of damages the defendant claimed that the plaintiff did not suffer loss and damages of the kind and to the extent the plaintiff alleged.

Held, dismissing the plaintiff's claim with costs:

(1) Though the parties had referred to the agreement in dispute as restructured agreement, in essence it related to the continuing facility with some amendments to terms relating to payment and/or facilities. Those terms were to assist the defaulting plaintiff to regularise the account. The court is not bound by the labels used by the parties. The law requires the court to assess the true meaning and effect of the transactions contemplated by the parties (see para 17).

(2) As a general rule, banks can be liable to damages to borrower for not extending the agreed facilities. But courts have always been vigilant to ensure the borrowers have strictly complied with the promises and undertaking which they have given and are not in breach of any terms and conditions (see para 20).

(3) There was no concluded restructured agreement. The only agreement which was intact and binding on the parties were all the agreements relating to the continuing facility and not the letter of offer dated 26 February 1996 per se which was never reduced to a concluded contract by formal execution by both parties. The supplementary agreement was never executed by the defendant to reflect a concluded contract. The plaintiff had failed to comply with the terms and conditions of the letter of offer (see paras 23–24).

(4) The evidence relating to quantum was speculative. Whatever said in evidence to support the claim for damages was not within the contemplation of parties. In addition, no prior notice was given immediately to the defendant after the letter dated 26 April 1996 relating to proposed claim against the defendant. No evidence was led to show what steps were taken to mitigate the loss. The whole evidence on quantum was substantially based on the evidence of PW2 which was unreliable. It is trite that the loss of profits on a contract of which the defendant had no notice is clearly too remote. The statutory enunciation of the rule in *Hadley v Baxendale* (1854) 9 Exch 341 is found in s 74 of the Contracts Act 1950. Hence, the plaintiff's evidence on quantum did not satisfy the rudimentary requirement in s 74 to award damages (see para 27).

[Bahasa Malaysia summary

Defendan telah memberikan kemudahan-kemudahan perbankan kepada plaintif. Plaintif mungkir beberapa kali dan selepas perbincangan bagi membantu plaintif memenuhi kewajipan-kewajipan tersebut, melalui surat tawaran bertarikh 26 Februari 2006 kemudahan tersebut disusun semula tertakluk kepada terma-terma dan syarat-syarat. Plaintif mendakwa bahawa apabila kemudahan tersebut disusun semula dan dipersetujui, adalah jelas difahami bahawa bahagian kemudahan yang tidak digunakan masih tersedia untuk plaintif. Menurut plaintif, pihak bank kemudiannya mengubah fikiran dan perubahan ini dimaklumkan kepada plaintif melalui surat bertarikh 26 April 1996 yang menyatakan terma-terma dan syarat-syarat baru. Plaintif tidak menerima kontrak ubahan unilateral ini dan menghujah bahawa perjanjian mengikat dan dimeterai adalah melalui surat bertarikh 26 Februari 1996. Plaintif menghujah bahawa surat berikutnya yang bertarikh 26 April 1996 yang mengenakan syarat deposit pada dasar 1:1 mengenai bahagian yang tidak digunakan merupakan pelanggaran perjanjian kemudahan penyusunan semula. Plaintif menuntut kerugian dan ganti rugi daripada pelanggaran kontrak oleh defendan. Defendan menghujah bahawa kemudahan penyusunan semula tertakluk kepada terma-terma dan syarat-syarat dan dilakukan bagi menggantikan ketidaklaksanaan pinjaman oleh plaintif dan plaintif gagal mematuhi terma-terma dan syarat-syarat. Berhubung ganti rugi, defendan mendakwa bahawa plaintif tidak mengalami kerugian dan ganti rugi sehubungan dengannya dan sehingga peringkat seperti yang dihujahkan plaintif.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Walaupun plaintif merujuk kepada perjanjian yang dipertikaikan sebagai perjanjian penyusunan semula, secara intipatinya ia berhubung dengan menyambung kemudahan dengan pindaan-pindaan kepada terma-terma berkenaan pembayaran dan/atau kemudahan-kemudahan. Terma-terma tersebut adalah bagi membantu plaintif yang mungkir untuk meregulasikan akaun tersebut. Mahkamah tidak terikat dengan label-label yang digunakan oleh pihak-pihak. Undang-undang memerlukan mahkamah menilai maksud sebenar dan kesan transaksi yang dijangkakan oleh pihak-pihak (lihat perenggan 17).

(2) Sebagai peraturan am, pihak bank bertanggungan untuk mengganti rugi kepada peminjam kerana tidak melanjutkan kemudahan-kemudahan yang dipersetujui. Tetapi mahkamah sentiasa berjaga-jaga bagi memastikan peminjam mematuhi sepenuhnya janji-janji dan akujanji yang diberikan oleh mereka dan tidak melanggar mana-mana terma dan syarat (lihat perenggan 20).

(3) Tidak terdapat perjanjian penyusunan semula yang diputuskan. Satu-satunya perjanjian yang masih utuh dan mengikat ke atas pihak-pihak ialah kesemua perjanjian berkaitan dengan kemudahan yang berterusan dan bukannya surat tawaran bertarikh 26 Februari 1996 yang tidak pernah dijadikan kontrak dimeterai melalui perlaksanaan formal oleh kedua-dua pihak. Perjanjian tambahan tidak pernah disempurnakan oleh defendan untuk mencerminkan kontrak yang dimeterai. Plaintif gagal untuk mematuhi terma-terma dan syarat-syarat surat tawaran tersebut (lihat perenggan 23–24).

(4) Keterangan mengenai kuantum adalah spekulatif. Apa-apa yang dikatakan dalam keterangan untuk menyokong tuntutan untuk ganti rugi tidak dijangka oleh pihak-pihak. Tambahan pula, tiada notis diberikan segera kepada defendan selepas surat bertarikh 26 April 1996 mengenai tuntutan yang dicadangkan terhadap defendan. Tiada keterangan yang menunjukkan langkah-langkah yang diambil bagi mengurangkan kerugian. Keseluruhan keterangan berkenaan kuantum berdasarkan keterangan PW2 tidak boleh dipercayai. Adalah nyata bahawa kehilangan keuntungan di atas kontrak di mana defendan tidak dimaklumkan mengenainya adalah jelas terlalu terpencil. Penjelasan statutori dalam prinsip kes *Hadley v Baxendale* (1854) 9 Exch 341 terkandung dalam s 74 Akta Kontrak 1950. Oleh itu, keterangan plaintif mengenai kuantum tidak memenuhi keperluan asas dalam s 74 untuk mengaward ganti rugi (lihat perenggan 27).]

Notes

For cases on banks and banking business generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1877–2022.

For cases on construction of terms of contract generally, see 3(1) *Mallal's Digest* (4th Ed, 2005 Reissue) paras 3088–3198.

For cases on damages, see 3(1) *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2586–2612.

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47, PC (refd)

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2006] 5 MLJ 1, FC (refd)

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 3 All ER 577, CA (refd)

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754, SC (refd)

Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan [2004] 1 MLJ 411; [2003] 4 CLJ 785, CA (refd)

Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76; [1993] 2 CLJ 495, SC (distd)

A *Bank Bumiputra (M) Bhd v SAL Enterprise Sdn Bhd & Ors* [2006] 2 MLJ 233; [2005] 4 CLJ 277, CA (refd)
BSNC Corporation Bhd v Affin Holdings Bhd & Anor [2009] 8 MLJ 11, HC (refd)
Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)
B *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; [1994] 1 CLJ 19, HC (refd)
Citibank NA v Ooi Boon Leong [1981] 1 MLJ 282, FC (refd)
Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257; [2004] 1 CLJ 701, FC (refd)
C *Dato' Mohd Anuar bin Embong & Anor v Bank Bumiputra Malaysia Bhd* [2003] 3 MLJ 37, CA (refd)
Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor [2005] 3 MLJ 293; [2005] 1 CLJ 501, CA (refd)
Glamour Green Sdn Bhd v AmBank Bhd & Ors and another appeal [2007] 3
D CLJ 413, CA (refd)
Golf Cheque Book Sdn Bhd & Anor, The v Nilai Springs Bhd [2006] 1 MLJ 554; [2006] 1 CLJ 259, CA (refd)
GS GilI Sdn Bhd v Descente, Ltd and another appeal [2008] 6 MLJ 181, CA (refd)
E *Hadley & Anor v Baxendale & Ors* (1854) 9 Exch 341, PC (folld)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481; [1999] 2 CLJ 788, CA (refd)
Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd [1995] 2 MLJ 153, CA (refd)
F *Hong Leong Bank Bhd v WT Industries Sdn Bhd & Ors* [2005] 8 CLJ 239, HC (refd)
Kam Mah Theatre Sdn Bhd v Tan Lay Soon [1994] 1 MLJ 108; [1994] 1 CLJ 1, SC (refd)
Kopeks Holdings Sdn Bhd v Bank Islam Malaysia Bhd [2009] 9 MLJ 609, HC
G (refd)
Lee Chin Kok v Jasmin Arunthuthu Allegakoen & Ors [2000] 4 MLJ 481; [2000] 4 CLJ 305, SC (refd)
Lim Chee Holdings Sdn Bhd v RHB Bank (formerly known as Kwong Yik Bank Bhd) [2005] 6 MLJ 497; [2005] 4 CLJ 305, CA (refd)
H *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405; [1994] 2 CLJ 25, SC (refd)
MBf Finance Bhd v Low Ping Ming t/a Low Peng Enterprise [2005] 3 MLJ 208; [2005] 1 CLJ 305, CA (refd)
National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2
I MLJ 211; [1983] 2 CLJ 76, FC (refd)
Nga Sheau Sheau v United Merchant Finance Bhd [2004] 4 MLJ 53; [2004] 3 CLJ 243, HC (refd)
Partenreederei MS Karen Oltmann v Scarsdale Shipping Co Ltd, The Karen Oltmann [1976] 2 Lloyd's Rep 708 (refd)

Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay (deceased)) v Cheok Toh Gong & Ors [1996] 1 MLJ 843, SC (refd)
Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi bin Ahmad & Ors [2005] 2 MLJ 32; [2005] 1 CLJ 417, CA (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 2 CLJ (Rep) 635, HC (refd)
See Teow Chuan & Anor v YAM Tunku Nadzaruddin Ibni Tuanku Jaafar & Ors [2007] 2 MLJ 212; [2007] 2 CLJ 82, CA (refd)
Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory (a firm) [1979] AC 91, PC (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)
Thien Kon Thai, Re [2008] 6 MLJ 278, CA (refd)
Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229; [2007] 1 CLJ 611, CA (refd)
Subramaniam v PP [1956] MLJ 220, PC (refd)
United Malayan Banking Corporation Bhd v Aluminex (M) Sdn Bhd & Anor [1993] 3 MLJ 587, SC (refd)

Legislation referred to

Contracts Act 1950 s 74

David Gurupatham (Ranjan Chandran with him) (Ranjan Chitravathy & Nik) for the plaintiff.
Nithin Nadkarni (Lee Hishamuddin Allen & Gledhill) for the defendant.

Hamid Sultan J:

[1] This is my judgment in respect of the plaintiff's claim against the defendant for breach relating to RM8.8m restructured facility agreement. The plaintiff had mounted a claim in damages amounting to more than RM21m.

BRIEF FACTS

[2] As early as 1993 the defendant has granted banking facility such as overdraft, letter of credit/trust receipt, bank guarantee, etc. The plaintiff was in default on several occasions and after much negotiation to assist the plaintiff to meet with their obligations the facility was by a letter of offer dated 26 February 2006 restructured subject to terms and conditions. The restructured facility was related to the continuing facility amounting to RM8.8m. The particulars are as follows:

(a) Overdraft	RM2,500,000
(b) Term Loan	RM4,977,000
(c) LC/TR/BA	RM1,023,000
(d) BG	RM300,000
	RM8,800,000

[3] The plaintiff says that (a) although the new facility was a restructured facility it was to be utilised for the unused portion. In the LC/TR facility a sum of RM1,023,000 of the total sum of RM4,977,000 was unused and still available. As for the bank guarantee of RM300,000 this facility too was unused (b) when the restructured facility was negotiated and agreed upon in February 1996, it was clearly understood that the unused portion of the facility was still available to the plaintiff (c) subsequently the bank changed its mind. This change was communicated to the plaintiff vide a letter dated 26 April 1996 setting out new terms and conditions. The plaintiff did not accept this unilateral variation of contract.

[4] The plaintiff asserts that a binding and concluded agreement has been reached by the said letter dated 26 February 1996. And the subsequent letter dated 26 April 1996 which imposed a condition of deposit of 1:1 basis in respect of unutilised portion of (LC/TR/BA) of RM1.023m. And this, the plaintiff says is a breach of the restructured facility agreement and claims loss and damages following from the defendant's breach of contract. The particulars read as follows: (a) the plaintiff and the defendant had several meetings before 26 February 1996; (b) on 26 February 1996 the defendant made the offer to restructure the facility in writing; (c) the offer was duly accepted by the plaintiff's bank under the hand of two directors; (d) the plaintiff was under this facility entitled to use: (i) sum of RM1,023,000 for LC facilities; (ii) sum of RM300,000 for bank guarantee.

[5] In denying liability the defendant says (a) the restructured facility was subject to terms and conditions and was done to rehabilitate the non-performance of the loan by the plaintiff; (b) enhancing the security by executing a supplementary facility agreement and procuring from all the directors of the plaintiff a fresh letter of guarantee to the defendant for the sum of RM8.8m; (c) servicing interest of RM44,378 a month, commencing from 1 January 1996, by paying a sum of at least RM15,000 a month, with the balance to be settled by upliftment of the fixed deposit earlier pledged by the plaintiff; (d) the plaintiff failed to comply with the terms and conditions.

[6] And the defendant asserts the plaintiff by a letter dated 8 April 1996 gave notice to their solicitors that the plaintiff would be withdrawing the letter of guarantee executed pursuant to the letter of offer dated 26 February

1996 and the agreement to restructure the facility never came into effect, and the defendant relies on the following letters dated (a) 20 March 1996; (b) 22 March 1996; (c) 1 April 1996; (d) 8 April 1996; and (e) 20 July 1996 between the parties.

[7] The defendant also asserts the plaintiff did not make any payment towards servicing the interest or the monthly instalments from 1 January 1996.

[8] In respect of unutilised portion, the defendant says the plaintiff had been informed and knew, by October 1995, that it was not allowed to utilise any existing facilities until all its overdue trust receipts were settled. And asserts; (a) in fact, pursuant to a meeting held on 8 April 1996, the plaintiff, by its director, Mej Jen (B) Dato' Hj Fauzi bin Hussain, for the first time, requested that the plaintiff be allowed to utilise the unused portion of the facility, in particular the new restructured limit of the LC/TR facility of RM1,023,000 and the bank guarantee facility of RM300,000; (b) at the said meeting the plaintiff requested that the requirement to put a cash deposit on 1:1 basis for utilisation of the LC/TR facility be waived. The defendant refers to a letter dated 16 April 1996 from the plaintiff; (c) given that the conditions set out had still not been complied with, the defendant subsequently approved utilisation of the new restructured limit of the LC/TR facility of RM1,023,000 on a 1:1 basis and that the plaintiff is to service the monthly interest of RM15,000 commencing on 1 January 1996. The defendant refers to a letter dated 26 April 1996 between the parties.

[9] In addition the defendant says that that the defendant has the right to amend the terms and conditions and to impose additional clauses in respect of the facilities granted to the plaintiff by notice in writing and relies on the various letters of offers dating from 1993 to the letter of offer dated 26 February 1996, in particular para 8 of the said letter.

[10] The defendant also says the plaintiff failed to immediately protest in respect of letter dated 26 April 1996 and in consequence is stopped or bared from instituting the present suit.

[11] Further the defendant says between March to October 1996 the plaintiff and/or its directors continued to submit various proposals to restructure the facility and to reduce the amount outstanding and relies on letters dated 20 July 1996, 8 August 1996 and 28 October 1996. And in consequence the alleged restructuring agreement did not come into effect.

[12] In respect of damages the defendant says the plaintiff did not suffer loss and damages of the kind and to the extent the plaintiff alleges. And asserts as follows: (a) the plaintiff was a poorly managed company and it could not have reached the profits claimed; (b) there was no agreement with Kretam or its subsidiaries for supply of poultry; (c) it had utilised all or almost all facilities for the importation of livestock, leaving only RM117,524.10 and as such could not have generated profits for importation of cattle as pleaded.

[13] In essence the defendant says the plaintiff's claim is vexatious and frivolous.

[14] The agreed facts reads as follows:

(a) The plaintiff company applied for a credit facility with the defendant bank and was given the following facility on 21 April 1993.

(i) Overdraft	RM200,000
(ii) LC (sight)/TR (120 days)	RM500,000
(iii) BG	RM100,000

(b) On 16 November 1993, the defendant bank gave additional credit facility as follows:

Overdraft	RM300,000
LC (sight)/TR (120 days)	RM500,000

(c) The combined facility was therefore, overdraft of RM500,000 and LC/TR facility of RM1,000,000. The security for the two facilities are as set out in the letters of offer dated 21 April 1993 and 16 November 1993.

(d) On 14 July 1994, there was an increase in the facility granted by the defendant.

(i) Overdraft	RM1,500,000
(ii) LC/TR (120/90 days) (sight/issuance 120 days)	RM4,000,000
(iii) BG (Tender)	RM200,000
Total	RM5,700,000

(e) The additional security for this loan are as set out in the letter of offer dated 14 July 1994.

(f) In March 1995 an additional facility of RM1,500,000 was approved for the plaintiff.

(g) The facility as granted by the defendant is made up as follows:

FACILITY: Type	Restructured Limit (RM'000)
Overdraft	2,500
Term Loan	4,977
LC/TR/BA	1,023
BG	300
TOTAL	8,800

(h) The defendant had agreed to the restructuring on the terms and conditions as set out in the defendant's letter to the plaintiff dated 26 February 1996.

(i) By a letter dated 26 April 1996 the defendant had, inter alia, notified the plaintiff the decision taken by the defendant's Head Office to the effect that utilisation of the new restructured limit of the trade bills LC/TR/BA of RM1,023m shall be on 1:1 basis.

(j) The claim of the plaintiff herein is related to and concerns the facility, type LC/TR/BA of RM1,023m referred to under item 1 of the defendant's letter of 26 February 1996.

The issues to be tried reads as follows:

(a) Whether the plaintiff was already in default of any of the banking facilities granted by the defendants to the plaintiff prior to February 1996?

(b) Whether the defendant had, as early as in September 1995, informed the plaintiff that any further letters of credit (hereinafter referred to as 'LCs') could only be issued on a 1:1 basis?

(c) Whether the agreement to restructure the facility of 26 February 1996 ('restructured agreement') is an agreement which is effective and binding on the plaintiff and defendant?

(d) Whether the plaintiff breached the restructured agreement by failing to:

(i) comply with its conditions and/or conditions precedent;

(ii) service interest of RM44,378 per month from 1 January 1996 in the manner set out in the restructured agreement;

(iii) make payment towards the outstanding TR facility with effect from 1 January 1997 in the manner set out in the restructured agreement;

(iv) duly execute and forward to the defendant a stamped supplementary facility agreement; and/or

(v) duly execute and forward to the defendant a stamped fresh letter of guarantee on the terms of the restructured agreement?

(e) Whether the plaintiff is stopped from bringing its claim?

(f) Whether the restructured agreement:

(i) is intended to restructure the outstanding trust receipts ('TR') amounting to RM4.977m into a term loan facility as alleged by the defendant, or

(ii) is intended to restructure the entire facility amounting to RM8.8m as alleged by the plaintiff?

(g) Whether the defendant had agreed under the restructured agreement to allow the plaintiff to utilise the unused portion of the facilities?

(h) If so, whether the defendant breached the restructured agreement by refusing to allow the plaintiff to utilise the unused portion of the facilities?

(i) In the alternative, whether the defendant had the right to unilaterally amend the terms and conditions of the restructured agreement and to impose additional terms in respect of the facilities granted to the plaintiff by notice in writing?

(j) What if any, loss and damage has the plaintiff suffered?

PRELIMINARIES

[15] Two witnesses gave evidence for the plaintiff and two for the defendant. The plaintiff's case as per the statement of claim appears to be simple and straight forward. But the conduct of the parties and various letters and agreements before and/or after the letter of offer dated 26 February 1996 will clearly show that the facts of this case will not strictly fall within the facts stated in *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76; [1993] 2 CLJ 495, where the validity of the contract or the purpose of the facility was not in dispute. This is a very important distinction which must be kept in mind to weigh the plaintiff's case.

[16] I also note that though the parties had referred to the agreement in dispute as restructured agreement, in essence it relates to the continuing facility with some amendments to terms relating to payment and/or facilities. And those terms have been explained to be, to assist the defaulting plaintiff to regularise the account. And the evidence will also show that the primary purpose which caused the letter of February 1996 to be issued was at the insistence of the plaintiff to enable them to pay back and or honour the payment to the facilities which had been given and continuing. It must be emphasised that the court is not bound by the labels used by the parties. The

law requires the court to assess the true meaning and effect of the transactions contemplated by the parties. In *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405; [1994] 2 CLJ 25, the evidence showed that the original facility had expired and a letter of renewal was issued by the bank, with new terms on interest and security. The bank, in an affidavit, admitted that this letter created a new facility. However, the Supreme Court held that it was not bound by the labels used by the parties, but had to look at the substance of the matter to ascertain the true meaning and effect of the documents. Looking beyond the terminology used by the parties, this was clearly not a new facility but a continuation of the existing facility, with some revised terms.

[17] In addition the plaintiff's claim for damages relating to poultry and cattle prima facie from the documents and evidence will appear to have no nexus to the proposed restructured facility which was essentially given to the plaintiff to assist repayment. Very importantly, despite the courts' various query during trial relating to the agreement for poultry with Kretam, the plaintiff's failed to disclose any such concluded agreement. This conduct places the credibility of the plaintiff's witness PW2 in much disrepute taking into consideration the plaintiff were defaulters of facility agreement, they were not able to meet the obligation to the continuing facilities advanced by the defendant was only limited to RM8.8m and the plaintiff has mounted a claim for damages of more than RM24m, which need to be assessed much on the credibility of the evidence of PW2 in the instant case. All these put the bona fide of the plaintiff's claim into question. The plaintiff and defendant relied on the following cases: *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1; *Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153; *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; *See Teow Chuan & Anor v YAM Tunku Nadzaruddin Ibni Tuanku Jaafar & Ors* [2007] 2 MLJ 212; [2007] 2 CLJ 82; *GS GilI Sdn Bhd v Descente, Ltd and another appeal* [2008] 6 MLJ 181; *The Golf Cheque Book Sdn Bhd & Anor v Nilai Springs Bhd* [2006] 1 MLJ 554; [2006] 1 CLJ 259; *Re Thien Kon Thai* [2008] 6 MLJ 278; *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76; [1993] 2 CLJ 495; *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15; *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory (a firm)* [1979] AC 91; *Dato' Mohd Anuar bin Embong & Anor v Bank Bumiputra Malaysia Bhd* [2003] 3 MLJ 37; *Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay (deceased)) v Cheok Toh Gong & Ors* [1996] 1 MLJ 843; *Lim Chee Holdings v RHB Bank* [1989] 3 MLJ 360; [2005] 4 CLJ 305; *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1990] 2 CLJ (Rep) 635; *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; [1994] 1

CLJ 19; *Bank Bumiputra (M) Bhd v SAL Enterprise Sdn Bhd & Ors* [2006] 2 MLJ 233; [2005] 4 CLJ 277; *Partenreederei MS Karen Oltmann v Scarsdale Shipping Co Ltd, The Karen Oltmann* [1976] 2 Lloyd's Rep 708; *Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi bin Ahmad & Ors* [2005] 2 MLJ 32; [2005] 1 CLJ 417; *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577; *MBf Finance Bhd v Low Ping Ming t/a Low Peng Enterprise* [2005] 3 MLJ 208; [2005] 1 CLJ 305; *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481; [1999] 2 CLJ 788; *United Malayan Banking Corporation Bhd v Aluminex (M) Sdn Bhd & Anor* [1993] 3 MLJ 587; *Citibank NA v Ooi Boon Leong* [1981] 1 MLJ 282; *BSNC Corporation Bhd v Affin Holdings Bhd & Anor* [2009] 8 MLJ 11; *Hong Leong Bank Bhd v WT Industries Sdn Bhd & Ors* [2005] 8 CLJ 239; *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405; [1994] 2 CLJ 25; *Nga Sheau Sheau v United Merchant Finance Bhd* [2004] 4 MLJ 53; [2004] 3 CLJ 243; *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211; [1983] 2 CLJ 76; *Subramaniam v Public Prosecutor* [1956] MLJ 220; *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108; [1994] 1 CLJ 1; *Lee Chin Kok v Jasmin Arunthuthu Allegakoen & Ors* [2000] 4 MLJ 481; [2000] 4 CLJ 305; *Glamour Green Sdn Bhd v AmBank Bhd & Ors and another appeal* [2007] 3 CLJ 413; *Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor* [2005] 3 MLJ 293; [2005] 1 CLJ 501; *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701; *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47; *Kopeks Holdings Sdn Bhd v Bank Islam Malaysia Bhd* [2009] 9 MLJ 609; *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229; [2007] 1 CLJ 611; *Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan* [2004] 1 MLJ 411; [2003] 4 CLJ 785.

[18] I have heard the evidence, read the documents and submission of the parties in detail. The parties have dealt with the relevant issues and evidence in detail. I do not think that it will serve any useful purpose to repeat the submission of the parties in detail or discuss the evidence on the facts of the instant case in any detail. I take the view the plaintiff's claim must be dismissed. My reasons, inter alia, are as follows:

LIABILITY

[19] As a general rule, banks can be liable to damages to borrower for not extending the agreed facilities. But courts have always been vigilant to ensure the borrowers have strictly complied with the promises and undertaking which they have given and are not in breach of any terms and conditions. The learned authors of Pollock & Mulla on *Indian Contract and Specific Relief Act* (10th Ed) at p 632 state as follows:

At common law the rule is that for a party's failure to pay money at the appointed time, the other party will only be entitled to nominal damages though a man may be ruined by non-payment or the damage may be erroneous. But Romer LJ & Denning LJ seem to have doubted this rule. But where the defendant undertook to maintain the plaintiff's financial credit the plaintiff was not entitled to substantial damages for the defendant's default.

Calcutta High Court has held that where money is unlawfully withheld the remedy of the claimant is a decree for the recovery of money and not for damages. Illustration (n) of s 73 was referred to by the Court.

[20] In *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors*, the Supreme Court had adumbrated much on this area of law and awarded damages on the special facts of the case. In that case the bank had granted bridging finance operated under an overdraft facility to the first respondent. The respondent failed to service the interest and the facilities was withdrawn, and the appellant claimed for the outstanding sum inclusive of interest, and costs, notwithstanding it was a term that interest on all sums disbursed was to be capitalised and the appellants were aware pursuant to the negotiation to secure the facility that the repayment can only come after the first respondent receives money from the sale and purchase agreement relating to the project. The respondent counterclaimed for damages for breach of contract. The trial judge dismissed the appellant's claim and allowed the counterclaim. On appeal the Supreme Court allowed the appeal in part and held as follows:

(1) There had been negotiations between the appellants and the first respondent before the appellants agreed to give the bridging finance and the appellants were fully aware that the first respondent would receive no income from the project until the sale and purchase agreements for the project were signed;

(2) The appellants were not entitled to issue the recall letter purely on the ground that interest had not been serviced by the first respondent because the first respondent was not obliged under the agreement to pay interest during the bridging period;

(3) The typescript words in the agreement provided for a term loan whereas the printed words provided that the loan was repayable on demand. By applying the contra proferentes rule, the printed words must be rejected in favour of the typescript words;

(4) The appellants were in breach of contract when it treated the term loan as an demand loan and recalled it prematurely before its right to do so had accrued and the respondents were entitled to damages;

(5) The loss of profits on the Dungun project which the first respondent would suffer was the natural and probable result of the breach of the

agreement by the appellants and when the appellants agreed to provide the bridging finance to the first respondent, the appellants well knew of the loss that the first respondent would incur should the appellants break the contract;

(6) The loss of profits claimed in respect of the Alor Gajah project was dependent upon the application of profits from the Dungun project and as such the claim was too remote. The other heads of damages claimed by the respondents were not properly substantiated and should be disallowed;

(7) The dismissal of the appellants' claim in respect of the sum owing by the first respondents to the appellants on the overdraft facility on the ground that the appellants were in breach of contract in recalling the overdraft prematurely could not be justified. There was no ground in law from exempting the first respondent from liability to repay the loan;

(8) The appellants' claim for interest on the loan at the rate agreed in the agreement, for the period after the overdraft was prematurely recalled, must be disallowed on the ground that in so recalling the facility the appellants were in breach of contract

[21] There are number of decisions to show that courts have not been sympathetic to borrowers when the borrowers have not kept to the promise or pre-condition etc; but attempted to sue the bank for recalling the facilities (see *Lim Chee Holdings Sdn Bhd v RHB Bank (formerly known as Kwong Yik Bank Bhd)* [2005] 6 MLJ 497; [2005] 4 CLJ 305).

[22] In the instant case the plaintiff relies heavily on the letter of offer dated 26 February 1996 to say it was a restructured facility and compliance of its terms and condition leads to a concluded contract. And relies on the 26 April 1996 letter to say that the defendant was in breach of the concluded contract and that entitles to damages as pleaded. I find the pleadings, arguments, and evidence of the plaintiff to be shallow and unprecedented to entitle them to succeed. The statement of claim also does not say when the plaintiff terminated the said concluded agreement or when they protested against the defendant's breach taking into consideration there were still negotiations on various matters going on after 26 February 1996 and also after 26 April 1996. No reasonable mind will say on looking at the evidence as a whole that there was a concluded restructured agreement on 26 February 1996 or at any time thereafter, taking also into consideration that the plaintiff in this case is not seeking a declaration or its like to force the defendant to enter into a concluded agreement, pursuant to the letter of offer dated 26 February 1996. In my view the only agreement which was intact and binding on the parties must be all the agreements relating to the continuing facility and not the

letter of offer dated 26 February 1996 per se which was never reduced to a concluded contract by formal execution by both parties. In consequence, the facts of this case materially differs from the facts of *MAE Perkayuan,* which the plaintiff relies on and many other cases which were cited by the plaintiff. On a similar argument raised by the plaintiff, the court in *Kopeks Holdings v Bank Islam* on the facts of that case had this to say:

> Having regard to the terms of the letters of offer my view is that it could not have been the intention of the parties that the conditions precedent could be disregarded in the execution of the agreement. Since the parties' expressed intention was that the agreement was subject to the execution of the legal documents a legally binding contract could only come into existence if this condition precedent had been fulfilled. Until then the two letters of offer remained expressions of willingness on the part of the defendant to offer banking facilities to the plaintiff.

[23] I have gone through the letter of offer dated 26 February 1996 and the evidence in detail. It is my finding that the condition precedent set out in para 7 of the letter of offer was not satisfactorily satisfied taking into consideration para 4 which particularly states:

> Supplementary facility agreement or such other documentation as may be advised by the solicitor shall be effected to reflect the terms and conditions of the facilities.

In the instant case the supplementary agreement was never executed by the defendant to reflect a concluded contract. And in addition para 4 of the letter of offer gives wide discretion for other documents and this would include guarantees and or indemnities and who must execute, etc. In this respect I find much merit in the defendant's submission that the plaintiff had failed to comply with the terms and conditions of the letter of offer.

[24] It is my finding that the defendant's defence which I have set out earlier is substantiated with the relevant evidence and has merits. I have no reason to disbelieve the defendant's witnesses whom I find to be forthright and credible. It will serve no useful purpose to repeat issues relating to evidence as the defendant has dealt with it meticulously in the submission and adduce credible evidence to support the defence as well as the alternative arguments. In essence I accept the defendant's argument that the defendant is not liable.

QUANTUM

[25] It is my finding that the letter of offer was never at any point of time intended for the plaintiff for the poultry and cattle project which the plaintiff had pleaded. Further, the plaintiff's main witness PW2, who went to establish the quantum of loss and damage, in my view, is not a truthful witness. There

A are many reasons for my conclusion to name a few are as follows:

(a) PW2 said that there was a concluded contract between the plaintiff and Kretam for poultry business. This agreement was not produced before the trial or during the trial or when I requested the plaintiff's counsel
B to produce the same. The answers to my queries were all evasive and that document was never produced.

(b) PW2's evidence that the document was given to the defendant was never established during the trial. The defendant's witness confirmed
C that they have not seen the concluded contract and that they were only informed by the plaintiff of such a document.

(c) The defendant in the defence has specifically pleaded that there was no concluded agreement by the plaintiff with Kretam. If the document
D actually existed it would have been produced by the plaintiff. And more so, it is the duty and obligation of the plaintiff to produce the same at the request of the court and not give evasive answers. Non-production and/or evasive answers, however ingenious it may appear to be, most often will attract adverse presumption or place the issue of credibility of
E the claim in bad light.

(d) Common sense will dictate that if there was a document between plaintiff and Kretam relating to poultry business, it is in the interest of the plaintiff to have the original or at least a copy of the document and
F produce it in court.

[26] In the instant case, the evidence relating to quantum was speculative. And whatever said in evidence to support the claim for damages was not
G within the contemplation of parties. In addition, no prior notice was given immediately to the defendant after the letter dated 26 April 1996 relating to proposed claim against the defendant. No evidence was led to show what steps were taken to mitigate the loss. And the whole evidence on quantum was substantially based on the evidence of PW2 which I have found as
H unreliable. It is trite that the loss of profits on a contract of which the defendant had no notice is clearly too remote. The statutory enunciation of the rule in *Hadley & Anor v Baxendale & Ors* (1854) 9 Exch 341 is found in s 74 of the Contracts Act 1950. It is my finding that the plaintiff's evidence relating to quantum does not satisfy the rudimentary requirement set out in
I s 74 to award damages.

[27] For reasons stated above I dismiss the plaintiff's claim with costs. I fix costs in the sum of RM100,000 to be payable by the plaintiff to the defendant.

I hereby order so.

Plaintiff's claim dismissed with costs.

Reported by Kanesh Sundrum